IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARSHALL P. CLINE and	§	
MARY ELAINE CLINE,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	**Civil Action No. 3:14-cv-01565-D**
	§	
DEUTSCHE BANK NATIONAL TRUST	§	
COMPANY, AS TRUSTEE FOR LONG	§	
BEACH MORTGAGE LOAN TRUST	§	
2003-1, ITS SUCCESSORS AND	§	
ASSIGNS,	§	
	§	
Defendant.	§	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56(c) and Northern District of Texas LR 56.5, Defendant hereby files this Brief in Support of its Motion for Summary Judgment:

I. INTRODUCTION

This is a mortgage dispute involving homeowners who have been living in a million-dollar house for free, for nearly six years. To be clear, Plaintiffs have not made a payment since November 2009. To make matters worse, Plaintiffs' home is worth over one million dollars and their income was almost one million dollars last year, making them members of the so-called "Top 1%." But despite living a life of luxury, Plaintiffs now seek to have this Court award them a free house, claiming Defendant's lien is barred by limitations. Plaintiffs' lawsuit is not only offensive to the millions of hard-working Americans who strive to make their mortgage payments and abide by their financial obligations, but their legal claim fails as a matter of law.

II. SUMMARY OF THE ARGUMENT

Plaintiffs filed this lawsuit seeking a declaratory judgment to preclude Defendant[1] from foreclosing on their homestead due to the four-year statute of limitations in Section 16.035 of the Texas Civil Practice and Remedies Code. (Dkt. # 1-8 at ¶¶ 14-20.) Specifically, Plaintiffs assert that the statute of limitations has expired because more than four years have elapsed since Defendant accelerated Plaintiffs' Loan on January 26, 2009, which they contend makes the lien and power of sale void. (*Id.*) Plaintiffs' claim fails as a matter of law for two reasons.

First, the undisputed facts show that the Parties abandoned the January 2009 acceleration by their subsequent agreement and actions. Consequently, the cause of action no longer "accrues" from that date, and therefore, the statute of limitations has not expired. Among other things, Plaintiffs made three payments after the loan was accelerated, which Defendant accepted

[1] Plaintiffs and Defendant are referred to collectively herein as the "Parties."

and applied to the loan. Defendant also reviewed the Plaintiffs for a loan modification from August 2009 to January 2011—all while keeping the foreclosure process on hold. In addition, Defendant sent multiple letters to Plaintiffs after the January 2009 acceleration, whereby Defendant gave them the opportunity to cure the delinquency by paying only the past due payments and charges (as opposed to the accelerated balance on the loan). Accordingly, Defendant is entitled to summary judgment on Plaintiff's claim for declaratory judgment because the relevant statute of limitations has not expired.

Second, Plaintiffs are estopped from asserting limitations. The doctrine of quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. It is unconscionable to allow Plaintiffs to assert limitations based on the January 2009 acceleration given their subsequent actions in applying for a loan modification. Plaintiffs obtained a benefit from those actions because Defendant did not foreclose while it reviewed their application. Accordingly, Defendant is entitled to summary judgment on its affirmative defense of estoppel.

III.
SUMMARY JUDGMENT EVIDENCE

In support of its Motion, Defendant relies upon and incorporates herein by reference the following evidence, which is contained and numbered consecutively in the Appendix filed contemporaneously herewith, consistent with Northern District of Texas LR 56.6:

Exhibit A: A true and correct copy of the Declaration of Diane Weinberger and its exhibits 1-35 is attached hereto and incorporated by reference as Exhibits A-1 through A-35.

Exhibit B: True and correct certified copies of documents relating to the subject Property, which are filed of record in the Official Public Records of Dallas County, Texas, are attached hereto and incorporated by reference as

Exhibit B-1 through B-3.[2]

Exhibit C: True and correct copies of the *Plaintiffs' Responses to Defendant's First Set of Interrogatories to Plaintiffs* are attached hereto and incorporated by reference as Exhibit C.

Exhibit D: Excerpts from the transcript of the oral deposition of Marshall P. Cline taken on January 28, 2015 are attached hereto and incorporated by reference as Exhibit D.

IV.
UNDISPUTED MATERIAL FACTS

1. Plaintiffs are the owners of residential property located at 5419 Bent Tree Drive, Dallas, Texas 75248 (the "Property").[3]

2. On or about November 27, 2002, Plaintiffs obtained a home equity loan from Long Beach Mortgage Company ("Long Beach"), which is evidenced by a Texas Home Equity Fixed/Adjustable Rate Note (the "Note") in the original principal amount of $663,600.00, and a Texas Home Equity Security Instrument (the "Security Instrument") granting Long Beach a security interest in the Property.[4] The Note and Security Instrument were subsequently assigned to Deutsche Bank, who is the current mortgagee of record, as "mortgagee" is defined in TEX. PROP. CODE § 51.001(4).[5]

3. Shortly thereafter, Plaintiffs defaulted on their payments under the Note.[6] On June 27, 2008, Plaintiffs executed a Loan Modification Agreement wherein Plaintiffs agreed, among other things, that they had defaulted on the Note.[7] The Loan Modification Agreement capitalized past due amounts and established new terms for the repayment of the Note effective

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[2] Defendant requests that the Court take judicial notice of these public records pursuant to FED. R. EVID. 201.

[3] **Exh. B-1** (App. at 213); **Exh. D at 37:18-25** (App. at 247); *see also* Dkt. #1-15.

[4] **Exh. A** at ¶ 4 (App. at 007); **Exh. A-1** (App. at 012); **Exh. A-2** (App. at 018); **Exh. B-2** (App. at 213).

[5] **Exh. A** at ¶ 4 (App. at 007); **Exh. A-3** (App. at 030); **Exh. B-3** (App. at 228).

[6] **Exh. D** at 50:14—52:15 (App. at 250); **Exh. A-12** (App. at 089).

[7] **Exh. A** at ¶ 6 (App. at 007); **Exh. A-5** (App. at 061).

July 1, 2008, including a modified principal balance of $918,019.47.[8] The Loan Modification Agreement did not change the maturity date set forth in the Note and Security Instrument; thus, the maturity date of the Loan remained December 1, 2032.[9] The first modified payment was due on August 1, 2008.[10] The Note, Security Instrument, Loan Modification Agreement and related materials are referred to collectively as the "Loan."

4. Select Portfolio Servicing, Inc. ("SPS") is the current servicer of the Loan on behalf of Deutsche Bank, and it has been the servicer since May 1, 2013.[11] Prior to that, the Loan was serviced by Washington Mutual Bank, FA ("WaMu") and JP Morgan Chase Bank, National Association ("Chase"). Exh. A at ¶¶ 5, 7, 35 (App. at 007, 011).[12] SPS, WaMu and Chase are referred to collectively herein as the "Servicer."

5. Shortly after executing the Loan Modification Agreement, Plaintiffs once again defaulted on the Loan payments.[13] On November 5, 2008, the Servicer sent Plaintiffs a "Notice of Intent to Accelerate and Demand for Payment," which demanded payment of the three monthly payments due on the Loan for September 1, 2008, October 1, 2008, and November 1, 2008.[14] Plaintiffs failed to cure the default, and on January 26, 2009, Deutsche Bank (through

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[8] **Exh. A-5** (App. at 061).

[9] **Exh. A-5** (App. at 061); **Exh. A-1** (App. at 005).

[10] **Exh. A-5** (App. at 061).

[11] **Exh. A** at ¶ 3 (App. at 007); **Exh. A-35** (App. at 208).

[12] At the closing of the Loan, Long Beach transferred the servicing rights to Washington Mutual Bank, FA ("WaMu"). **Exh. A** at ¶ 5 (App. at 007). In 2006, WaMu became the ultimate successor to Long Beach by operation of law. **Exh. A** at ¶ 5 (App. at 007); **Exh. A-4** (App. at 033). Then, on or about September 25, 2008, WaMu was closed by the Office of Thrift Supervision and the FDIC was named receiver. **Exh. A** at ¶ 7 (App. at 007); **Exh. A-6** (App. at 069). Pursuant to a Purchase and Assumption Agreement between the FDIC as receiver of WaMu, and JP Morgan Chase Bank, National Association ("Chase"), Chase became the owner of all the loans and loan commitments of WaMu by operation of law. **Exh. A** at ¶ 7 (App. at 007); **Exh. A-6** (App. at 069). Accordingly, Chase took over as servicer of the Loan following its purchase of WaMu's loan portfolio.

[13] **Exh. D** at 101:5-12 (App. at 253); **Exh. A-12** (App. at 089).

[14] **Exh. A** at ¶ 8 (App. at 007); **Exh. A-7** (App. at 073).

counsel) sent a Notice of Acceleration to Plaintiffs.[15]

6. In an effort to avoid foreclosure, Plaintiffs contacted the Servicer to request consideration for loss mitigation alternatives, and told the Servicer they were committed to pursuing a stay-in-home option.[16] Accordingly, the Servicer agreed to work with the Plaintiffs toward a possible loan modification or other workout assistance to avoid foreclosure.[17]

7. On August 5, 2009, the Servicer informed Plaintiffs that their Loan may be eligible for a loan modification review, and asked the Clines to call to discuss the various options.[18] That same day, Plaintiffs were sent a new "Notice of Intent to Accelerate and Demand for Payment," which only demanded payment of the twelve past-due monthly installments on the Loan from September 1, 2008 through August 1, 2009 and certain other past due charges, totaling $119,684.46.[19] The letter further stated that the Plaintiffs had until September 4, 2009 to cure the default by paying those past-due amounts; otherwise the Loan would be accelerated and all sums owing under the Note and Security Instrument would be immediately due and payable.[20]

8. On August 15, 2009, Plaintiffs were approved for a Trial Plan Agreement.[21] The Servicer sent Plaintiffs a letter enclosing a copy of the Agreement, which asked them to sign and return it by September 15, 2009.[22] In addition, the letter explained that Plaintiffs would be considered for a permanent workout solution once the Trial Plan was completed.[23]

9. On August 28, 2009, Plaintiffs executed the Trial Plan Agreement whereby they

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[15] Dkt. #1-8 at 65-66.
[16] **Exh. D** at 118:8-12 (App. at 254); **Exh. A-10** (App. at 084).
[17] **Exh. A-10** (App. at 084).
[18] **Exh. A** at ¶ 10 (App. at 008); **Exh. A-9** (App. at 081).
[19] **Exh. A** at ¶ 9 (App. at 007); **Exh. A-8** (App. at 076).
[20] **Exh. A-8** (App. at 076).
[21] **Exh. A** at ¶ 11 (App. at 008); **Exh. A-10** (App. at 084).
[22] **Exh. A** at ¶ 11 (App. at 008); **Exh. A-10** (App. at 084).
[23] **Exh. A** at ¶ 11 (App. at 008); **Exh. A-10** (App. at 084).

agreed: (1) that the Loan was past due for the September 1, 2008 through August 1, 2009 payments; and (2) to make three monthly payments of $9,158.90 on or before September 1, 2009, October 1, 2009, and November 1, 2009, respectively.[24]

10. Pursuant to the Trial Plan Agreement, Plaintiffs made three payments on or around August 31, 2009, October 16, 2009, and November 19, 2009, respectively, each in the amount of $9,158.90.[25] All three of those payments were applied to the Loan.[26] Notably, two of the three payments were late, and none of them were made with certified funds, but all three payments were nevertheless applied to the Loan.[27]

11. The three payments that Plaintiffs made in August, October, and November 2009 were the last payments Plaintiffs ever made on the Loan, and the Loan is currently due for the November 1, 2008 payment.[28]

12. Thereafter, from October 2009 through November 2010, Plaintiffs exchanged correspondence with the Servicer in connection with their application for a loan modification.[29]

13. On October 9, 2009, the Servicer notified Plaintiffs that it was missing documentation necessary to complete the modification review.[30] Two weeks later, the Servicer sent a follow-up letter informing Plaintiffs that it was missing documentation necessary for the loan modification review.[31] On November 25, 2009, the Servicer sent Plaintiffs yet another

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[24] **Exh. A** at ¶ 12 (App. at 008); **Exh. A-11** (App. at 087); **Exh. D** at 130:14-17; 134:1-25—135:1 (App. at 255, 256).

[25] **Exh. A** at ¶ 13 (App. at 008); **Exh. D** at 135:17-23 (App. at 257); **Exh. A-12** (App. at 089).

[26] **Exh. A** at ¶ 13 (App. at 008); **Exh. A-12** (App. at 089); **Exh. D** at 171:25—174:15 (App. at 266-269).

[27] **Exh. A-12** (App. at 089); **Exh. A-16** (App. at 139); **Exh. D** at 143:4-8 (App. at 261).

[28] **Exh. A** at ¶ 13 (App. at 008); **Exh. A-12** (App. at 089); **Exh. D** at 172:10—174:15 (App. at 267-269).

[29] **Exh. A** at ¶¶ 14-27 (App. at 008-009); **Exh. D** at 154:23—155:13 (App. at 264-265); **Exhs. A-14** through **Exh. A-27** (App. at 131-171).

[30] **Exh. A** at ¶ 14 (App. at 008); **Exh. A-14** (App. at 131).

[31] **Exh. A** at ¶ 15 (App. at 008); **Exh. A-15** (App. at 135).

letter advising that it was still missing documentation needed for the loan modification review.[32] Finally, in December 2009 and January 2010, Plaintiffs faxed the missing documentation to the Servicer.[33]

14. On February 18, 2010, Plaintiffs were notified that their application for a loan modification was denied because they did not qualify under the applicable government guidelines.[34] However, the letter also informed Plaintiffs that they may be eligible for other modification programs offered by the Servicer.[35] Accordingly, Plaintiffs submitted a new application for a loan modification.[36]

15. On June 17, 2010, the Servicer responded to Plaintiffs' request and enclosed a package of information that Plaintiffs needed to complete and return in order to be considered.[37] After not receiving a response, the Servicer sent a "Final Notice" on July 15, 2010, wherein it once again requested that Plaintiffs submit the required information and documentation.[38]

16. On July 30, 2010, the Servicer received a facsimile from Plaintiffs with documents and information to initiate their modification review.[39] However, on August 25, 2010, Plaintiffs were advised that certain documentation was missing that was needed to complete the review.[40] On September 30, 2010, the Servicer sent Plaintiffs another letter informing them that it was still missing documentation necessary to evaluate their request for a

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[32] **Exh. A** at ¶ 17 (App. at 008); **Exh. A-17** (App. at 142).
[33] **Exh. A** at ¶¶ 18-19 (App. at 009); **Exh. A-18** (App. at 145); **Exh. A-19** (App. at 148).
[34] **Exh. A** at ¶ 20 (App. at 009); **Exh. A-20** (App. at 150).
[35] **Exh. A** at ¶ 20 (App. at 009); **Exh. A-20** (App. at 150).
[36] **Exh. D** at 149:20—150:17 (App. at 262-263.
[37] **Exh. A** at ¶ 21 (App. at 009); **Exh. A-21** (App. at 154).
[38] **Exh. A** at ¶ 22 (App. at 009); **Exh. A-22** (App. at 157).
[39] **Exh. A** at ¶ 23 (App. at 009); **Exh. A-23** (App. at 160); **Exh. D** at 149:20—150:17 (App. at 262-263).
[40] **Exh. A** at ¶ 24 (App. at 009); **Exh. A-24** (App. at 162).

loan modification.[41] Finally, on October 11, 2010, Plaintiffs faxed the missing documentation to the Servicer.[42]

17. On or around November 19, 2010, Plaintiffs' second application for a modification was denied.[43] The Servicer explained that Plaintiffs did not qualify for a modification under either the federal government's Home Affordable Modification Program, or any of the Servicer's modification programs.[44]

18. On January 7, 2011, Plaintiffs were sent a letter entitled "Acceleration Warning (Notice of Intent to Foreclose)," which advised them that their Loan was in default for failure to pay the November 1, 2008 payment and subsequent payments.[45] The Servicer warned the Clines that the maturity date of the Loan would be accelerated if the Clines failed to pay the past-due amounts within thirty-two (32) days.[46]

19. Plaintiffs did not cure the default, and on August 26, 2011, CODILIS & STAWIARSKI, P.C. ("Codilis"), a law firm representing the Servicer, sent Plaintiffs a "Notice of Acceleration."[47]

20. Nonetheless, Plaintiffs were then given at least five more opportunities to reinstate the Loan for less than the full, accelerated amount:

> (1) on October 24, 2011, Codilis responded to Marshall Cline's request for a reinstatement quote on the Loan, which provided an opportunity to cure the default on the Loan by paying the delinquency amount of $377,731.69 by November 5, 2011. At that time, the total amount required to pay off the Loan in full was $1,256,744.77;[48]

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[41] **Exh. A** at ¶ 25 (App. at 009); **Exh. A-25** (App. at 166).
[42] **Exh. A** at ¶ 26 (App. at 009); **Exh. A-26** (App. at 169).
[43] **Exh. A** at ¶ 27 (App. at 010); **Exh. A-27** (App. at 171).
[44] **Exh. A** at ¶ 27 (App. at 010); **Exh. A-27** (App. at 171).
[45] **Exh. A** at ¶ 28 (App. at 010); **Exh. A-28** (App. at 176).
[46] **Exh. A** at ¶ 28 (App. at 010); **Exh. A-28** (App. at 176).
[47] **Exh. A** at ¶ 31 (App. at 010); **Exh. A-29** (App. at 183).
[48] **Exh. A** at ¶ 30 (App. at 010); **Exh. A-30** (App. at 188).

(2) on December 30, 2011, Codilis responded to the Clines' request for a reinstatement quote on the Loan, which provided an opportunity to cure the default on the Loan by paying the delinquency amount of $398,496.71 by January 5, 2012;[49]

(3) on January 5, 2012, Codilis responded to the Clines' request for a reinstatement quote on the Loan, which provided an opportunity to cure the default on the Loan by paying the delinquency amount of $398,771.70 by January 13, 2012;[50]

(4) on November 14, 2012, Chase responded to the Clines' request for a reinstatement quote on the Loan, which provided an opportunity to cure the default on the Loan by paying the delinquency amount of $460,499.54 by December 13, 2012;[51]

(5) on January 17, 2013, Chase responded to the Clines' request for a reinstatement quote on the Loan, which provided an opportunity to cure the default on the Loan by paying the delinquency amount of $478,237.60 by February 16, 2013.[52]

21. Thereafter, on August 15, 2013, Deutsche Bank filed an action in the 192nd District Court of Dallas County styled *In Re: Order for Foreclosure Concerning 5419 Bent Tree Drive, Dallas, Texas 75248* under Cause No. DC-13-09195 (the "2013 Foreclosure Action"), seeking an order under Texas Rule of Civil Procedure 736 allowing Deutsche Bank to proceed with foreclosure of the Property.[53]

22. On October 2, 2013, Plaintiffs filed a general denial and asserted an affirmative defense claiming that Deutsche Bank's foreclosure action is barred by limitations.[54]

23. Then, on November 27, 2013, Plaintiffs filed a separate lawsuit in the 68th District Court of Dallas County, Texas, Cause No. DC-13-14013 (the "Current Lawsuit"), seeking a declaratory judgment that Deutsche Bank's right to foreclose on the Property was void

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[49] **Exh. A** at ¶ 31 (App. at 010); **Exh. A-31** (App. at 195).

[50] **Exh. A** at ¶ 32 (App. at 010); **Exh. A-32** (App. at 199).

[51] **Exh. A** at ¶ 33 (App. at 010); **Exh. A-33** (App. at 202)

[52] **Exh. A** at ¶ 34 (App. at 010); **Exh. A-34** (App. at 205)

[53] The pleadings and other documents from the 2013 Foreclosure Action that were filed in the 192nd District Court of Dallas County, Texas are matters of public record that can be accessed through the court's website at http://courts.dallascounty.org under Cause No. DC-13-09195. Defendant requests that the Court take judicial notice of the 192nd District Court's records regarding the 2013 Foreclosure Action pursuant to FED. R. EVID. 201.

[54] *See supra* note 6; *see also* Dkt. #1-4.

pursuant to the statute of limitations.[55] Also on November 27, 2013, Plaintiffs filed a Motion to Dismiss the 2013 Foreclosure Action pursuant to TEX. R. CIV. P. 736.11, which was granted by the court.[56]

24. On January 21, 2014, Plaintiffs filed an *Amended Application for Declaratory Judgment and Rule 194 Request for Disclosure* in the Current Lawsuit.[57] Deutsche Bank then removed the Current Lawsuit to this Court on April 29, 2014.[58]

25. Plaintiffs continue to live in the Property as their primary residence, which is currently appraised at over one million dollars.[59] Plaintiffs' income in 2014 was approximately $950,000 dollars, and is expected to be the same going forward.[60] In short, Plaintiffs have been living in a million dollar house for free, for nearly the last six years.[61]

V.
ARGUMENTS & AUTHORITIES

The Court is familiar with the summary judgment standard. To summarize, summary judgment is appropriate where the pleadings and evidence show that no genuine issue exists as to any material fact and that the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Rule 56 mandates the entry of summary judgment against a party who fails, after adequate discovery and upon motion, to make a sufficient showing to establish the existence of an element essential to that party's case, and upon which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In such an instance, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other material facts immaterial." *Id*.

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[55] The pleadings and other documents from the Current Lawsuit that were filed in the 68th District Court of Dallas County, Texas are matters of public record that can be accessed through the court's website at http://courts.dallascounty.org under Cause No. DC-13-14013. Defendant requests that the Court take judicial notice of the 68th District Court's records regarding the Current Lawsuit pursuant to FED. R. EVID. 201; *see also* Dkt. #1-5.

[56] *See supra* note 6.

[57] *See supra* note 8; *see also* Dkt. #1-8.

[58] *Id.*; *see also* Dkt. #1.

[59] **Exh. D** at 37:18-25 (App. at 247); Dkt. #1-15; **Exh. D** at 202:7-9 (App. at 270). The Dallas Central Appraisal District tax records are a matter of public record and can be accessed through its website at http://www.dcad.org. Defendant requests that the Court take judicial notice of the appraisal district records regarding the subject Property pursuant to FED. R. EVID. 201.

[60] **Exh. D** at 22:20—23:5 (App. at 245-246).

[61] **Exh. D** at 202:20—203:6 (App. at 270-271).

A. PLAINTIFFS' CLAIM FOR DECLARATORY JUDGMENT FAILS AS A MATTER OF LAW

Plaintiffs seek a declaratory judgment that Deutsche Bank is barred from foreclosing on the Property due to the four-year statute of limitations set forth in Section 16.035 of the Texas Civil Practice and Remedies Code. (Am. Compl. ¶¶ 14-20.) Specifically, Plaintiffs contend that the statute of limitations has expired because more than four years have elapsed since Deutsche Bank accelerated Plaintiffs' Loan on January 26, 2009. (*Id.*) However, the undisputed facts show that the Parties abandoned the 2009 acceleration by their subsequent agreement and actions. Accordingly, Plaintiffs' claim fails as a matter of law.

1. Statute of Limitations

Under Texas law, a real property lien and the power of sale to enforce it become void if a lender does not seek to foreclose within four years of the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE § 16.035; *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 567 (Tex. 2001). "If a note secured by a real property lien is accelerated pursuant to the terms of the note, then the date of accrual becomes the date the note was accelerated." *Khan v. GBAK Properties, Inc.*, 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Where acceleration is optional at the election of the note holder, the cause of action accrues only when the note holder actually exercises its option to accelerate, which requires both a (1) notice of intent to accelerate, and (2) notice of acceleration. *Holy Cross*, 44 S.W.3d at 566.

2. Abandonment of Acceleration

However, "if a note holder abandons acceleration, he no longer must foreclose within four years from the date of acceleration." *Leonard v. Ocwen Loan Servicing, LLC*, No. H–13–3019, 2014 WL 4161769, at *2 (S.D. Tex. Aug. 19, 2014) (citing numerous cases in Texas and the Fifth Circuit); *Boren v. U.S. Bank, N.A.*, No. H-13-2160, 2014 WL 5486100 at *1-2 (S.D. Tex. Oct. 29, 2014) (agreeing with *Leonard*). There are several ways acceleration can be abandoned. For instance, "the holder can abandon acceleration if the holder continues to accept payments without exacting any remedies available to it upon declared maturity." *Holy Cross*, 44 S.W.3d at 567; *see also Rivera v. Bank of America, N.A.*, No. 4:13CV195, 2014 WL 2996159, at *6 (E.D. Tex. July 3, 2014) ("[A]cceleration was abandoned ... when Defendants accepted a payment subsequent to the acceleration and opted not to foreclose at that time."). "In addition, acceleration can be abandoned by agreement or other action of the parties." *Khan*, 371 S.W.3d at 353 (citing *Holy Cross*, 44 S.W.2d at 567); *Clawson v. GMAC Mortg.*, No. 3:12-cv-00212, 2013 WL 1948128, *4 (S.D. Tex. May 9, 2013) (citing cases for the proposition that "a note holder may abandon acceleration "without express agreement from the borrower").

3. The January 26, 2009 Acceleration Was Abandoned

In this case, the January 26, 2009 acceleration was abandoned by the Parties' subsequent actions and agreements. As discussed *supra*, those actions included, but are not limited to the fact that: (1) the Parties entered into a Trial Plan Agreement on August 28, 2009; (2) the Plaintiffs tendered and Defendant accepted three payments on the Loan from August 2009 through November 2009; (3) the Parties engaged in discussions from August 2009 to November 2010 about a potential loan modification to avoid foreclosure; and (4) the Plaintiffs were sent new notices of intent to accelerate, as well as numerous offers to reinstate, under which Plaintiffs were given the opportunity to cure the default and reinstate the Loan for less than the accelerated amount. Such actions are sufficient to constitute abandonment of acceleration.

Indeed, numerous federal district courts in Texas have recently addressed situations similar to the facts presented in this case and found that the parties' actions constituted abandonment of acceleration. *See, e.g., Mendoza v. Wells Fargo Bank, N.A.*, No. H-14-554, 2015 WL 338909 at *3-5 (S.D. Tex. Jan. 23, 2015) (Lake, J.) (acceleration abandoned where plaintiff made post-acceleration payments that defendant applied to the loan, and defendant sent Plaintiff a new notice of default and intent to accelerate, demanding only the past-due amount of the loan); *Stewart v. U.S. Bank National Association*, No. H-13-3197, slip op. at 4-14 (S.D. Tex. Jan. 23, 2015) (Hittner, J.) (acceleration abandoned where the parties entered into "a forbearance agreement that provide[d] the full amount of the loan [was] not due immediately, rather, establishe[d] monthly payments in exchange for not foreclosing," and where the parties tendered and accepted payments as part of a trial period plan in an effort to secure a loan modification) (citing *In re: Rosas*, No. SA-14-CV-601-XR, 2014 WL 5149418 at *5 (W.D. Tex. Oct. 14, 2014) (Rodriguez, J.) (acceleration abandoned where parties entered into a forbearance agreement and the parties tendered and accepted payments in accordance with the forbearance agreement)); *Leonard*, 2014 WL 4161769 at *4-5 (Atlas, J.) (acceleration abandoned where defendant issued a new notice of default for less than accelerated amount); *Boren*, 2014 WL 5486100 at *1-2 (Miller, J.) ("The court has reviewed the *Leonard* opinion and finds the legal reasoning sound."); *but see Murphy v. HSBC Bank USA*, 4:12-cv-03278, 2014 WL 1653081 at *5 (S.D. Tex. April 23, 2014) (Harmon, J.).[62] To be clear, each of the Parties' actions and agreements constituting

[62] The court in *Leonard* distinguished *Murphy* on the facts, noting it was "unpersuaded that *Murphy* serves as persuasive guidance" since Ocwen sent the plaintiffs multiple documents communicating that only a portion of the debt was due and that acceleration of the full debt had been abandoned. *Leonard*, 2014 WL 4161769 at *5, n. 6. It is also important to recognize that *Murphy* is subject to a pending motion for reconsideration, and that in issuing the *Murphy* decision, Judge Harmon overruled her own previous order on the defendant's motion to dismiss, and also rejected Magistrate Judge Stacy's report and recommendation on the plaintiff's motion for rehearing. *See Murphy v. HSBC Bank USA*, 4:12-cv-03278, slip ops. at Dkt. #19 ("Opinion and Order") (Harmon, J.) and Dkt. #28 ("Memorandum and Recommendation Denying Plaintiffs' Motion for Rehearing and Reconsideration") (Stacy, Mag. J.), *overruled* in *Murphy*, 2014 WL 1653081 at *5 (Harmon, J.); *see also Murphy v. HSBC Bank USA*, 4:12-cv-03278 at Dkt. #33 ("Defendant's Motion for Reconsideration and Rehearing"), which remains pending before Judge Harmon.

abandonment are discussed in detail below.

(a) Trial Plan Agreement

The January 26, 2009 acceleration was abandoned when the Parties entered into the Trial Plan Agreement on August 28, 2009. **Exh. A-11** (App. at 087). Importantly, the Trial Plan Agreement stated that Plaintiff's loan was "due for the months of 09/01/08 to 08/01/09." It did not state that the full amount of the Note was due. *Id.* Plaintiffs signed the Trial Plan Agreement whereby they agreed that their Loan was "due for the months of 09/01/08 to 08/01/09." **Exh. A** at ¶ 12 (App. at 008); **Exh. A-11** (App. at 087); **Exh. D** at 130:14-17; 134:1-25—135:1 (App. at 255-257).

The Trial Plan Agreement allowed Plaintiffs to make three monthly payments of $9,158.90 in September, October, and November 2009. **Exh. A-11** (App. at 087). So long as Plaintiffs made the three payments, Deutsche Bank agreed to refrain from foreclosing while it reviewed Plaintiffs' application for a loan modification. **Exh. A-11** (App. at 087) ("If all payments are made as scheduled, we will reevaluate your application for assistance and determine if we are able to offer you a permanent workout solution to bring your loan current……"If any part of this Agreement is breached, [Defendant] has the option to terminate the Agreement and begin or resume foreclosure proceedings pursuant to your loan documents and applicable law.") Thus, when Plaintiffs signed the Trial Plan Agreement, acceleration of the Note was abandoned and Deutsche Bank no longer had to foreclose within four years of January 26, 2009. *Stewart*, No. H-13-3197, slip op. at 4-14.

(b) Payments of Less than the Amount Due Under Acceleration

The January 26, 2009 acceleration was also abandoned when Plaintiffs tendered, and Deutsche Bank accepted, three payments of less than the amount due under acceleration, without Deutsche Bank pursuing any remedies available upon acceleration. Specifically, pursuant to the

Trial Plan Agreement, Plaintiffs tendered payments in September, October, and November 2009 of $9,158.90 each. **Exh. A** at ¶ 13 (App. at 008); **Exh. D** at 135:17-23 (App. at 257). Notably, two of the Plaintiffs' payments under the Trial Plan Agreement were late and none of them were in certified funds. **Exh. A-12** (App. at 089); **Exh. A-16** (App. at 139); **Exh. D** at 143:4-8 (App. at 261). Consequently, Plaintiffs had breached their obligations under the Trial Plan Agreement. **Exh. A-11** (App. at 087) ("If you do not make your payments on time … this Agreement will be in breach and collection and/or foreclosure activity will resume."); *see also* **Exh. D** at 140:9—143:8 (App. at 258-261) (acknowledging that Plaintiffs were advised of the late payment and informed that certified funds were required if the Loan was in foreclosure). Nevertheless, Deutsche Bank still accepted the Plaintiffs' payments and applied them to the Loan. **Exh. A** at ¶ 13 (App. at 008). Deutsche Bank did not attempt to re-accelerate the Loan and/or foreclose on the Property until 2011, which was nearly two years after Plaintiffs made their last payment. **Exh. A-28** (App. at 176); **Exh. A-29** (App. at 183).[63]

Thus, Deutsche Bank accepted Plaintiffs' payments without pursuing foreclosure, a remedy that was available to it upon acceleration. Deutsche Bank also could have pursued foreclosure upon Plaintiffs' breach of the Trial Plan Agreement, but it did not. Instead, Deutsche Bank continued to work with the Plaintiffs toward a loan modification, and did not pursue foreclosure. Such actions constitute abandonment of the 2009 acceleration. *Mendoza*, 2015 WL

[63] Plaintiffs' argument that the three payments they made in 2009 do not constitute abandonment since they were only trial period plan payments (as opposed to regular monthly payments) lacks merit. Plaintiffs made that argument in their interrogatory responses and during Mr. Cline's deposition. **Exh. C** (App. at 231); **Exh. D** at 48:3—49:17 (App. at 248-249). Indeed, that argument was recently rejected by Judge Hittner in a case involving nearly identical facts. *Stewart*, No. H-13-3197, slip op. at 12. As in that case, the Clines tendered those trial payments knowing they were less than the amount due under acceleration, and knowing that Deutsche Bank would keep foreclosure on hold while it reviewed Plaintiffs for a loan modification. Thus, Plaintiffs' actions and knowledge were consistent with abandonment of acceleration, and at the time they made those payments, they benefitted from abandonment by not being foreclosed upon. Accordingly, Plaintiffs' tender of payments of less than the amount due under acceleration, and Deutsche Bank's acceptance of such payments without pursuing any remedies available upon acceleration, constituted abandonment of acceleration of the Note, and Deutsche Bank no longer had to foreclose within four years of January 26, 2009. *Stewart*, No. H-13-3197, slip op. at 4-14.

338909 at *3-5; *Stewart*, No. H-13-3197, slip op. at 4-14.

(c) Application for a Loan Modification

The January 26, 2009 acceleration was also abandoned as a result of the Parties' loss mitigation efforts. To be clear, after the Loan was accelerated in January 2009, Plaintiffs contacted the Servicer to request consideration for loss mitigation alternatives and told the Servicer they were committed to pursuing a stay-in-home option. **Exh. D** at 118:8-12 (App. at 254); **Exh. A-10** (App. at 084). In response, the Servicer agreed to work with the Plaintiffs toward a possible loan modification or other workout assistance to avoid foreclosure. **Exh. A-10** (App. at 084). Accordingly, Deutsche Bank sent Plaintiffs a letter on August 5, 2009, informing them that their Loan may be eligible for a modification review, and asked the Clines to call to discuss the various options. **Exh. A** at ¶ 10 (App. at 008).

Shortly thereafter, on August 15, 2009, Plaintiffs were approved for the Trial Plan Agreement, which Plaintiffs signed on August 28, 2009. **Exh. A** at ¶ 11 (App. at 008). After Plaintiffs tendered all three payments under that agreement, Deutsche Bank complied with its corresponding obligations by reviewing the Plaintiffs' application for a loan modification – all while not pursuing foreclosure. **Exh. A** at ¶¶ 14-27 (App. at 008-009). In fact, Deutsche Bank diligently worked with Plaintiffs to complete two separate loan modification reviews over a period of about eighteen months (from August 2009 through January 2011). *Id.* Plaintiffs' applications were denied both times, but Deutsche Bank did not attempt to re-accelerate the Loan or pursue foreclosure during the time Plaintiffs were being reviewed for a modification. **Exh. A-20** (App. at 150); **Exh. A-27** (App. at 171); **Exh. A** at ¶¶ 14-27 (App. at 008-009). Accordingly, the discussions between the Parties regarding a loan modification during the period following Trial Plan Agreement also demonstrate the 2009 acceleration was abandoned. *In re: Rosas,* 2014 WL 5149418 at *5.

(d) New Notices of Intent to Accelerate and Offers to Reinstate

The January 26, 2009 acceleration was also abandoned when Deutsche Bank sent subsequent notices to Plaintiffs demanding less than the full, accelerated balance on the Loan. On August 5, 2009, Deutsche Bank sent Plaintiffs a "Notice of Intent to Accelerate and Demand for Payment," which demanded payment of the twelve past-due monthly installments that were due on the Loan from September 1, 2008 through August 1, 2009. **Exh. A** at ¶ 9 (App. at 007). The letter further stated that "[i]f the breach is not cured on or before September 4, 2009, Washington Mutual *will accelerate* the maturity of the Promissory Note…." **Exh. A-8** (App. at 076) (emphasis added). Thus, Plaintiffs were given the opportunity to cure the default by paying only the past due sums on the Note, as opposed to the full accelerated balance on the Loan. This correspondence is sufficient by itself to constitute abandonment of the January 2009 acceleration. *Leonard*, 2014 WL 4161769 at *4-5; *Boren*, 2014 WL 5486100 at *1-2.

Similarly, on January 7, 2011, after Deutsche Bank completed its evaluation of Plaintiffs' eligibility for a loan modification, Deutsche Bank sent Plaintiffs a letter entitled "Acceleration Warning (Notice of Intent to Foreclose)." **Exh. A** at ¶ 28 (App. at 010). The letter is similar to the August 5, 2009 notice, and states that the Loan was past-due for the payments commencing with the November 1, 2008 payment, and gave the Plaintiffs thirty-two days to cure the default by paying the past-due amount, otherwise "Chase *will accelerate* the maturity of the Loan…." *Id.* (emphasis added). Thus, Plaintiffs were once again given the opportunity to cure the default by paying only the past due sums on the Note, as opposed to the full accelerated balance on the Loan. Such action abandoned the January 2009 acceleration. *Leonard*, 2014 WL 4161769 at *4-5; *Boren*, 2014 WL 5486100 at *1-2.

Furthermore, Plaintiffs were then given no less than five more opportunities to reinstate the Loan by paying only the past-due amounts on the Loan—all of which were made in response to requests received from Plaintiffs. Specifically, Deutsche Bank sent Plaintiffs reinstatement quotes on October 24, 2011, December 30, 2011, January 5, 2012, November 14, 2012, and January 17, 2013, wherein Deutsche Bank gave Plaintiffs the opportunity to cure the delinquency and reinstate the Loan by paying only the past-due balance on the Note, as opposed to the full, accelerated balance. **Exh. A** at ¶¶ 30-34 (App. at 010).

To summarize, the January 26, 2009 acceleration was abandoned by the Parties subsequent agreement and actions. Accordingly, the statute of limitations has not expired and Plaintiffs' declaratory judgment claim fails as a matter of law.

B. PLAINTIFFS' LIMITATIONS CLAIM IS BARRED BY THE DOCTRINE OF ESTOPPEL

Defendant is also entitled to judgment as a matter of law on its affirmative defense of estoppel. Various types of estoppel apply to prohibit a party from asserting limitations or a position inconsistent with prior positions or conduct. *See, e.g, Leonard v. Eskew,* 731 S.W.2d 124, (Tex. App.—Austin 1987, writ ref'd n.r.e.) (noting that estoppel is applicable to a whole range of conduct in numerous contexts, including where a party may be estopped to interpose limitations). The doctrine of quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). Stated differently, quasi-estoppel "applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Id.* It does not require a showing of false representation or detrimental reliance, and it may be established as a matter of law. *Forney 921 Lot Development Partners I, L.P. v. Paul Taylor Homes, Ltd.*, 349 S.W.3d 258, 268-70 (Tex. App.—Dallas 2011).

This is precisely the type of case where quasi-estoppel applies because it would be unconscionable to allow Plaintiffs to assert limitations given their subsequent applications for a loan modification following the January 2009 acceleration. As discussed *supra*, Plaintiffs entered into the Trial Plan Agreement in August 2009, whereby they agreed to make payments on the loan in an effort to obtain a permanent loan modification. By doing so, Plaintiffs obtained a benefit because Defendant did not foreclose while it reviewed their application for a loan modification. Defendant could have simply foreclosed on the Plaintiffs, but it instead chose to accept Plaintiffs' payments and work with them in an effort to help them avoid foreclosure.

VI.
CONCLUSION

To summarize, the undisputed facts show that the January 2009 acceleration was abandoned by the Parties' subsequent agreement and actions, and thus, the statute of limitations has not expired. Moreover, Plaintiffs are estopped from asserting limitations because the delay was caused by their own request for financial assistance, which they benefitted from by avoiding foreclosure. Accordingly, Plaintiffs' claim for declaratory judgment fails as a matter of law.

The reality is that Plaintiffs filed this lawsuit in an effort to try and win a free house. This Court should not countenance that request. Particularly from homeowners who have admittedly been living in a million dollar house for free for the last six years. Such a windfall is not only undeserved, but it runs afoul of precedent. *See Wigginton v. Bank of New York Mellon*, 488 F. Appx. 868, 871 (5th Cir. 2012) ("Winning a free house simply because the mortgage lenders sought to use normal means to recover it from a defaulted debtor would indeed be a lucky strike. But such windfalls are the province of sweepstakes, not of the federal courts.").

VII.
PRAYER

WHEREFORE, Defendant respectfully requests that, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court grant the foregoing Motion and dismiss all of Plaintiffs' claims with prejudice as to the re-filing of same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon the following ***via the CM/ECF system and/or facsimile and/or certified mail, return receipt requested and/or electronic mail*** pursuant to the Federal Rules of Civil Procedure on this 16th day of February, 2015:

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